Supreme Court, U.S.
FILED
MAR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1347

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GARY GREEN,

Petitioner,

v.

MAURICE P. FOLEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Bruce Lawrence Adelson
BRINCEFIELD, HARTNETT
& ASSOCIATES, P.C.
526 King Street, Suite 423
Alexandria, VA 22314
(703) 836-2880

John Raymond Hartnett
BRINCEFIELD, HARTNETT
& ASSOCIATES, P.C.
526 King Street, Suite 423
Alexandria, VA 22314
(703) 836-2880

Counsel of Record

March 20, 1989

QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals acted properly and within its discretion by directing that summary judgment be entered for Respondent based upon an uncontroverted record which supported that ruling.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATUTES AND RULES INVOLVED 3

RESPONDENT'S SUPPLEMENTAL STATEMENT OF THE CASE 7

REASONS FOR DENIAL OF THE WRIT 10

CONCLUSION 19

CERTIFICATE 20

TABLE OF AUTHORITIES

Cases:

Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 78 S. Ct. 893, 2 L. ed. 2d 953 (1958) 17

Florida Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S. Ct. 1210, 10 L. ed. 2d 248 (1963) 17–18

Fountain v. Filson, 336 U.S. 681, 69 S. Ct. 754, 93 L. ed. 973 (1949) 16

Globe Liquor v. San Roman, 332 U.S. 571, 68 S. Ct. 246, 92 L. ed. 179 (1948) 16–17

Layne & Bowler Corporation v. Western Well Works, 261 U.S. 387, 43 S. Ct. 422, 67 L. ed. 712 (1923) 11

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 71 S. Ct. 453, 95 L. ed. 479 (1951) 11

Singleton v. Wulff, 428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) 18

Statutes and Rules:

28 U.S.C. § 2106 3,11,17

Sup. Ct. R. 17.1 3,10,11,14

Fed. R. App. P. 10 3,4,9,14

I.O.P. 10.4 of the Rules of the Fourth Circuit Court of Appeals. 4,14

Fed. R. Civ. P. 60(b)(3 5,9

Va. Code Ann. § 8.3-603(1) (1950) 4,5,4

Va. Code Ann. § 49-25 (1950) 5,6

Va. Code Ann. § 49-26 (1950) 6,11

Va. Code Ann. § 50-25(2)(a) (1950) 7

Va. Code Ann. § 50-73.42 (1950) 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GARY GREEN,

Petitioner,

v.

MAURICE P. FOLEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR

A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The respondent, Maurice P. Foley, respectfully prays this Court deny the Petition for Writ of Certiorari of Gary Green.

STATUTES AND RULES INVOLVED

1. 28 U.S.C. 2106: The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

2. Rule 17.1 of the Rules of the Supreme Court of the United States: A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

3. Rule 10 (e) of the Federal Rules of Appellate Procedure: CORRECTION OR MODIFICATION OF THE RECORD. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident

or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

4. I.O.P. 10.4 of the Rules of the Fourth Circuit Court of Appeals: SUPPLEMENTAL RECORDS, MODIFICATION OR CORRECTION. Disputes concerning the accuracy or composition of the record on appeal should be resolved in the trial court in the first instance, although the Court of Appeals has the power, either on motion or of its own accord, to require that the record be corrected or supplemented. It is unnecessary to seek permission of the Court of Appeals to supplement the record and the record may be supplemented by the parties by stipulation or by order of the district court at any time during the appellate process.

5. Rule 60(b)(3) of the Federal Rules of Civil Procedure: RELIEF FROM JUDGMENT OR ORDER.

Mistakes; Inadvertence, Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon subject terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

6. Va. Code Ann. § 8.3-603(1) (1950): The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with

knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties. This subsection does not however, result in the discharge of the liability

(a) of a party who in bad faith pays or satisfies a holder who acquired the instrument by theft or who (unless having the rights of a holder in due course) holds through one who so acquired it; or

(b) of a party (other than an intermediary bank or a payor bank which is not a depository bank) who pays or satisfies the holder of an instrument which has been restrictively indorsed in a manner not consistent with the terms of such restrictive indorsement.

7. Va. Code Ann. § 50-25 (2)(a) (1950): A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

8. Va. Code Ann. § 50-73.42 (1950): Limitations on distribution. A partner may not receive a distribution from a limited partnership to the extent that, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests, exceed the fair value of their partnership assets.

9. Va. Code Ann. § 49-25 (1950): SURETY MAY REQUIRE CREDITOR TO SUE. -- The surety, guarantor or

endorser, or his committee or personal representative, of any person bound by any contract may, if a right of action has accrued thereon, require the creditor or his committee or personal representative, by notice in writing, to institute suit thereon, and if he be bound in a bond with a condition, or for the performance of some collateral undertaking, he shall also specify in such requirement the breach of the condition or undertaking for which he requires suit to be brought. Such written notice shall also notify the creditor, his committee or personal representative, that failure to act will result in the loss of the surety, guarantor or endorser, his committee or personal representative as security for the debt in accordance with § 49.26 of the Code of Virginia.

10. Va. Code Ann. § 49-26 (1950): EFFECT OF FAILURE OF CREDITOR TO SUE. If such creditor, or his committee or personal representative, shall not, within thirty days after such requirement, institute suit against every party to such contract who is resident in this State and not insolvent and prosecute the same with due diligence to judgment and by execution, he shall forfeit his right to demand of such surety, guarantor or endorser or his estate, and of his cosureties and their estates, the money due by any such contract for the payment of money, or the damages sustained by any breach of the collateral condition or undertaking specified as aforesaid; but the conditions, rights and remedies against the principal debtor shall remain unimpaired thereby.

RESPONDENT'S SUPPLEMENTATION OF THE STATEMENT OF THE CASE

Respondent disagrees with Petitioner's presentation of the Statement of the Case in the following particulars:

1. Green's claim that the funds deposited into the partnership account "played no role in the purchase of the notes" is unsupported by the record. It is also contrary to the totality of testimony given at the Silverstein and Gunn depositions, which were not made a part of the record by Green. Green now improperly attempts to supplement the record by including in his Appendix misleading excerpts of those depositions. Green's claim that the cashier's check was obtained with funds debited directly from the personal accounts of Zimpel and Silverstein is only half true. See Petitioner's Appendix B at 14a.

The facts supported by the uncontroverted record below, as well as the Silverstein and Gunn depositions, demonstrate that Gunn, the bank officer, was entirely unaware that Zimpel and Silverstein had deposited the funds into the partnership account and then returned those same funds to their personal accounts prior to requesting that the personal accounts be debited in order to purchase the cashier's check. Silverstein's full account agrees with Zimpel's in all relevant particulars.

2. The Zimpel, Silverstein and Gunn depositions were all available to Green prior to oral argument in the Court of Appeals. Green never relied upon the Silverstein and Gunn depositions nor disputed the facts portrayed in the Zimpel deposition.[1]

---

[1]As the Court of Appeals recognized, the laundering of the funds via the circuitous bank transactions had as its goal the concealment of the fact, also recognized in Green's own affidavit, that partnership funds had been created by the deposit into the partnership account. A discharge and extinguishment of the debt occurred under Virginia law since partnership funds had been used to acquire the partnership debt. See Petitioner's Appendix B at 8a.

3. The "Green letter," which detailed the conspiracy between Green and Foley's erstwhile partners, was produced on July 2, 1987 just before the hearing on summary judgment. The letter was accompanied by other production which counsel for Green described to the panel at oral argument as "voluminous."[2]

4. As recognized by the Court of Appeals, Foley acted with dispatch to verify the "Green letter." After his Motion to Vacate pursuant to Fed.R.Civ.P. 59(e) was denied, Foley undertook to depose Zimpel. It was the Zimpel deposition which brought to light the implementation of the "Green letter." See Petitioner's Appendix B at 7a. The circuitous bank transactions and the device of the cashier's check were used to conceal the fact that partnership funds had discharged the debt under Virginia law. See Petitioner's Appendix B at 8a and 25a. Immediately after the Zimpel deposition, Foley requested an extension of time from the Court of Appeals and filed his *Motion for Relief from Judgment* pursuant to Rule 60(b)(3).[3]

5. Green neglects to inform that Foley's counsel wrote to the Clerk of the Court of Appeals only after an improper ex parte letter was sent by Green's counsel directly to the appellate panel one day after oral argument. The letter of Green's counsel was a rehash of his arguments the day

---

[2]Foley's discovery requests had been hand-delivered to Green's counsel on June 3, 1987. Green's production of the material was hardly "early," as he would have this Court believe. Indeed, Green's counsel admitted in the course of the Zimpel deposition that the "Green letter" was produced unwillingly, by mistake. See Petitioner's Appendix B at 17a.

[3]Green's opposition to Foley's 60(b)(3) Motion did not dispute but rather conceded the facts and the sequence of events borne out by Zimpel's deposition. Green argued to the District Court that the deposit into the partnership account was a "mistake" and that the funds never became partnership property. Green made the same argument, upon the same facts, to the Court of Appeals. He specifically did not argue that different funds were used and in fact, none were.

before. The portion of the Zimpel deposition transmitted by Foley consisted of a one page excerpt in which Green's counsel admitted that the pivotal "Green letter" had been produced by mistake. The excerpt contradicted a statement made by Green's counsel to the appellate panel at oral argument that the incriminating letter had been produced willingly. The one page excerpt played no role in the ruling of the Fourth Circuit and is mentioned only in a footnote to the opinion. See Petitioner's Appendix B at 17a, n.6.

6. Green neglects to inform that the dispositive material relied upon by the Court of Appeals was part of a Joint Appendix and Agreed Designation of the Record. The dispositive material came from the Zimpel deposition which was indeed part of the District Court record, having been submitted to that court in the course of Foley's 60(b)(3) Motion.[4]

7. It bears repeating that the depositions of Silverstein and Gunn were available to both parties at least one (1) month prior to oral argument and for the three (3) months thereafter while the parties awaited the ruling of the Fourth Circuit. Green was never precluded from using that "evidence." Indeed, Fed.R.App.P. 10 (e) expressly authorizes such supplementation of the record where necessary.

8. Green never wavered from the version of facts he conceded in the District Court (*after* Foley filed his 60 (b) (3) motion) and borne out by the material submitted by Foley. There is only one version of the facts. The Court of Appeals correctly applied the law of Virginia to those facts.

---

[4]Fed.R.Civ.P. 60(b)(3) contemplates post-judgment submission of just such dispositive and fraudulently concealed information. There was no improper supplementation of the record, as Green suggests.

REASONS FOR DENIAL OF THE WRIT

SUMMARY OF ARGUMENT

I. The present case does not satisfy the threshold considerations, promulgated by this Court, for the granting of certiorari. Sup. Ct. R. 17. There is no conflict of opinion among the Circuit Courts of Appeal regarding Virginia commercial law or Virginia partnership law, the dispositive issues below. The principles involved are of importance solely to the parties, not to the public at large. Furthermore, Petitioner is improperly attempting to re-open and alter a closed record in order to avoid an adverse judgment which was clearly warranted by the facts and the applicable law of Virginia.

II. The actions of the Court of Appeals are wholly consistent with prior decisions of this Court.

ARGUMENT

I. THE PRESENT CASE DOES NOT SATISFY THE THRESHOLD REQUIREMENTS FOR GRANTING CERTIORARI.

This Court has historically held that certiorari is granted only:

> . . . in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. ed. 712, 714 (1923), cited with approval in *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502, 71 S. Ct. 453, 456, 95 L. ed. 479, 482 (1951).

The Rules of the Supreme Court of the United States provide, in pertinent part, that certiorari is appropriate only where a federal court of appeals:

> . . . has so far departed from the accepted and usual course of judicial proceedings, . . . , to call for an exercise of this Court's power of supervision. Sup. Ct. R. 17.1(a).

None of the above considerations is applicable here.

Since the present case involved questions peculiar to Virginia commercial and partnership law (e.g. the Virginia Notice Statute, Va. Code Ann. §§ 49-25, 49-26 (1950)) there can be no conflict among the circuits. In addition, there is no conflict or uncertainty on the question of the inherent power of the Court of Appeals to reverse the judgment of the District Court and remand with instructions to enter judgment. Such power is expressly authorized by statute. 28 U.S.C. § 2106. The instant case concerns no issues of public import. Rather, it is a dispute concerning payment of a promissory Note.

Petitioner is now bound by the record which was established both by him and by Respondent.

Contrary to Petitioner's assertions, there has been neither abuse of discretion nor improper conduct by the Court of Appeals. Green disingenuously alleges that the Court of Appeals "improperly supplemented" the record by accepting a "partial transcript" submitted by Respondent's counsel. In fact, Foley sent a letter to the Clerk of the Court of Appeals in response to Green's antecedant, ex parte correspondence to the members of the appellate panel after oral argument. The letter of Respondent's counsel included one page of a deposition transcript which contradicted assurances given by Petitioner's counsel to the panel at oral argument that the "Green letter" had been produced willingly.[5] There was no impropriety in Respondent's answer to Petitioner's ex parte communication to the panel or Respondent's documenting, in a one page attachment, Petitioner's misrepresentation made during oral argument. See Respondent's Appendix B. Such was the conclusion of the Court of Appeals. See Petitioner's Appendix B at 16a, note 6.

Green alleges that the Court of Appeals impermissibly determined facts, and drew inferences from those facts. Nothing could be further from the truth. The Court of Appeals, in reaching its decision, noted that it was presented with "a clear and uncontroverted record." See Petitioner's Appendix B at 31a. In fact, the Court was scrupulously careful to avoid ruling on matters where there was any factual uncertainty. See Petitioner's Appendix B at 15a n.5 and 33a.

Green directs this Court to his belated affidavit as authority for the meritless proposition that facts exist which might exonerate him. Respondent objects to the affidavit and

---

[5]The "Green letter" was the crucial document which revealed the conspiracy involving Petitioner and Respondent's two partners in Fairfax Associates (See Respondent's Appendix A).

hereby moves that it be stricken from the petition. Petitioner has failed to inform this Court that his affidavit was not filed in either court below on the merits prior to entry of judgment (the affidavit opposed Foley's successful motion for sanctions filed *after* the Fourth Circuit opinion on the merits). The affidavit is an untimely and misleading attempt to create factual issues where there were none. An agreed designation of the record (see Respondent's Appendix D) and an undisputed set of facts was submitted to the Court of Appeals.[6] Indeed, the applicable law of Virginia was argued on that basis. See Petitioner's Appendix B at 31a.

Green never varied from the account he presented to the District Court in his Response to Foley's 60 (b)(3) motion. In opposing Foley's *Motion for Relief from Judgment* in the trial Court, Petitioner argued:

> (Zimpel) took personal funds and deposited them in the partnership account but withdrew them the next day and purchased the cashier's check in Plaintiff's name . . . The deposit was a mistake which was corrected . . . when the funds were withdrawn. At the time the cashier (sic) check was purchased, the funds were Zimpel's and Silverstein's personal funds. See: Respondent's Appendix C.

Petitioner *never* disputed that Zimpel and Silverstein withdrew the funds from their personal accounts and deposited them in the Fairfax Associates Partnership Account.

---

[6]Both parties were in possession of the Silverstein deposition for approximately two (2) months prior to oral argument in the Court of Appeals and the Gunn deposition for one (1) month prior to oral argument. In addition, oral argument took place approximately three (3) months before the Court of Appeals entered its opinion. Had these depositions truly represented new "evidence," then was the time to *supplement* the record. Indeed, Petitioner made no mention of this "evidence" at oral argument or by ex-parte correspondence thereafter. Petitioner first presented his current version of the facts only after suffering a reversal at the appellate level.

Petitioner never disputed that the funds were next returned to the personal accounts of Zimpel and Silverstein and then used to purchase the cashier's check in Green's name. It is obvious that Petitioner Green had ample opportunity to present his present version of the facts, had they existed, to the Court of Appeals.[7]

Petitioner's protestations also ignore his right and duty to supplement the appellate record pursuant to Fed.R.App.P. 10 (e) and I.O.P. 10.4 (*Supra*). Although Petitioner's counsel took it upon himself to communicate ex parte with the appellate panel, he did not even mention this so called "evidence." Petitioner's absolute failure to correct or supplement when appropriate bespeaks desperation and the invalidity of this current "last ditch" effort to avoid judgment and opprobrium.[8]

In its opinion, the Court of Appeals ruled that Petitioner had failed to disclose that the funds used to purchase the promissory notes were partnership funds which, pursuant to Virginia law, gave Respondent the affirmative defense of payment. See Petitioner's Appendix B at 25a. The Court ruled

---

[7]The dispute in the Court of Appeals was legal not factual. Foley claimed, as a matter of Virginia law, that the deposited funds remained partnership funds. Green claimed that they never became partnership funds (his unconvincing "mistake" argument) or that they reverted to personal funds prior to the purchase of the cashier's check. The Court of Appeals disagreed. The *only* "factual" dispute turned on Green's claim that the funds were deposited into the partnership account by "mistake." The uncontroverted record gave the lie to that subterfuge. *See:* Petitioner's Appendix B at 27a–29a.

[8]Petitioner has failed utterly to distinguish his circumstance from that of any other party overturned on appeal. Petitioner has availed himself of every opportunity for reconsideration of the adverse ruling. After the Court of Appeals issued its opinion, Petitioner filed a *Petition for a Rehearing, Suggestion for Rehearing in Banc*, and *Motion to Supplement the Appellate Record*. All such requests were denied by the Court of Appeals. Subsequently, Petitioner filed, with the Court of Appeals, a *Motion to Stay Mandate*, which was similarly denied on October 17, 1988. Finally, Petitioner filed an *Application for Stay of the Mandate* with this Court which was denied by Chief Justice Rehnquist on October 25, 1988.

that Green had misrepresented the source of these funds. See Petitioner's Appendix B at 30a. Petitioner's conduct, according to the Court of Appeals, precluded Respondent Foley from presenting his meritorious defense of payment to the District Court in a timely fashion. *Ibid.* *All* rulings were properly based upon the uncontroverted record and the applicable law of Virginia. No ruling was the product of a choice between disputed facts.

Petitioner's argument that the Court of Appeals violated his constitutional right to be heard is preposterous. He was twice heard on the merits: by the District Court (where he opposed Foley's 60(b)(3) Motion and by the Court of Appeals (on brief and at oral argument). Ex parte, he attempted to reinforce oral argument by letter to the appellate panel. That he did not challenge the facts presented, in any proceeding, pleading or motion below, demonstrates his admission of them. His post-reversal attempts to revise the facts must be viewed as untimely and meretricious. Respondent therefore objects to all material contained in Petitioner's Appendices L-R as *not* part of the record on the merits below and moves to strike the material from the petition.

II. THE ACTIONS OF THE COURT OF APPEALS ARE WHOLLY CONSISTENT WITH THE OPINIONS OF THIS COURT.

Petitioner claims that the actions of the Court of Appeals were improper and contrary to decisions of this Court. However, each case relied upon by Petitioner can be distinguished from the case at bar.

In *Fountain v. Filson*, 336 U.S. 681, 69 S. Ct. 754, 93 L. ed. 973 (1949), this Court reversed the judgment of a Court of Appeals which had reversed a summary judgment in the District Court for Petitioner Fountain and remanded with instructions to enter judgment for Respondent Filson. However, Fountain had not presented any evidence, facts, or law to the trial court. The action of the appellate court deprived Fountain of the opportunity to create a record. This Court held that the Court of Appeals entry of summary judgment (given a record bereft of Fountain's position, was error). 336 U.S. at 683, 69 S. Ct. at 754-755, 93 L. ed. at 913.

In the present case, Green never disputed Foley's version of the facts but rather adopted it in his arguments to the District Court and to the Court of Appeals. The adversarial process created an *uncontroverted* record. No disputed facts emerged until *after* Petitioner received an adverse ruling from the Court of Appeals.

Petitioner Green incorrectly claims that an appellate court cannot enter a judgment n.o.v. in favor of a party who was unsuccessful at trial. *Globe Liquor v. San Roman*, 332 U.S. 571, 68 S. Ct. 246, 92 L. ed. 179 (1948). However, in *Globe Liquor*, this Court held it improper for an appellate Court to enter judgment n.o.v. in favor of the losing party where that party had failed to move for judgment n.o.v. at trial. 332 U.S. at 574, 68 S. Ct. at 247, 92 L. ed. at 179. Clearly, the facts of *Globe Liquor* are inapposite to the case at bar, where summary judgment, not trial, determined the outcome in the lower

court. It cannot be doubted that an appellate court can direct that summary judgment be entered in such a situation as in the case at bar. 28 U.S.C. § 2106 (*Supra*). Furthermore, Foley had moved for summary relief in the District Court, thereby distinguishing the situation in *Globe Liquor*.

Equally inapposite is Petitioner's reliance upon *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 78 S. Ct. 893, 2 L. ed. 2d 953 (1958). In *Byrd*, the Court of Appeals disagreed with the District Court's construction of a state statute. As a result, the Appeals Court reversed the judgment of the District Court, and directed a judgment for respondent. 356 U.S. at 530, 78 S. Ct. at 897, 2 L. ed. 2d at 958. This Court reversed, holding that petitioner was entitled to try the issues involved under the Court of Appeals' new statutory interpretation. 356 U.S. at 532, 78 S. Ct. at 898, 2 L. ed. 2d at 959.

In the case at bar, however, Green availed himself of the opportunity to refute Foley's claim. Petitioner argued the *law* of Virginia on the subject of payment and discharge. See Petitioner's Appendix B at 26a–27a. Although the Court of Appeals was unpersuaded, it did not overturn any statutory interpretation of prevailing law as in *Byrd*. On the contrary, the uncontroverted record and prevailing Virginia law properly led the Court of Appeals to reverse the ruling of the District Court. *Ibid*. Such action is unquestionably within the purview of appellate authority. Petitioner was confronted with no surprises on appeal and had every opportunity, by way of brief and oral argument, to refute or rebut Respondent's view of the case.

Green has also directed this Court's attention to *Florida Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 83 S. Ct. 1210, 10 L. ed. 2d 248 (1963). In *Paul*, both parties were uncertain over the state of the record. Appellants argued that certain depositions and exhibits were admitted by the District Court while appellees assumed the opposite was true. 373 U.S. at

155, 83 S. Ct. at 1224, 10 L. ed. 2d at 264. Indeed, this Court was unable to determine whether or not the materials in question were admitted into evidence by the trial Court. *Ibid.* Clearly, such confusion about the record is distinguishable from the case at bar. No confusion regarding the state of the record ever existed at the appellate level or in the District Court. The Court of Appeals was presented with a "clear and uncontroverted record." See Petitioner's Appendix B at 31a. It did not base its decision on any matter which was not properly a part of that record. Therefore, Petitioner's reliance on *Paul* is also misplaced.

Finally, Petitioner argues that federal appellate courts cannot consider an issue which was not decided by the trial Court. *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed. 2 826 (1976). The validity of that principle cannot be doubted. However, such conduct did not occur in the case at bar. The Fourth Circuit decided and ruled upon only those issues which had been decided by the trial court and which were part of the record. It granted Foley the relief that he had expressly requested in his brief.

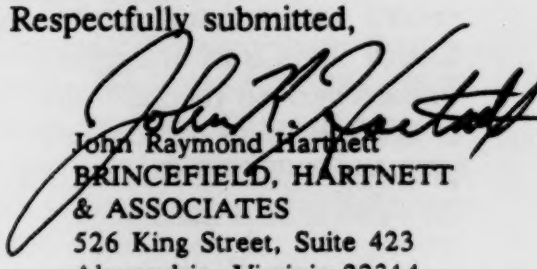
Singleton also stands for the inapposite proposition that a Court of Appeals should not consider the merits of a case where the only issue properly before it is a *Motion to Dismiss*. 428 U.S. at 119–120, 96 S. Ct. at 2876–2877, 49 L. Ed. 2d at 836. In *Singleton*, no answer or other responsive pleading addressed to the merits had been filed. The substantive issues had been neither raised nor pleaded prior to the District Court's Order granting the *Motion to Dismiss*. *Singleton* has no application to the case at bar since Foley had filed his *Answer* many months before and the case had long been "at issue" when the motions for summary judgment and relief from judgment reached the Fourth Circuit.

Not one authority cited by Petitioner supports his position. Each "authority" is factually distinguishable, legally inapposite, or both.

CONCLUSION

The Court of Appeals acted properly and within its discretion in the case at bar. There is no basis to support the instant Petition. The Petition should be denied.

Respectfully submitted,



Bruce Lawrence Adelson
BRINCEFIELD, HARTNETT
& ASSOCIATES
526 King Street, Suite 423
Alexandria, Virginia 22314
(703) 836-2880

John Raymond Hartnett
BRINCEFIELD, HARTNETT
& ASSOCIATES
526 King Street, Suite 423
Alexandria, Virginia 22314
(703) 836-2880

Counsel of Record

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Brief in opposition to Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals upon the person indicated below by depositing copies of same in the United States mail, first class postage prepaid, addressed as follows:

Philip L. Chabot, Jr.
GRAD, TOOTHMAN, LOGAN & CHABOT, P.C.
Suite 800
1990 M Street, N.W.
Washington, D.C. 20036
(202) 7375046
Counsel for Petitioner

This the 20th day of March, 1989.

John R. Hartnett
BRINCEFIELD, HARTNETT & ASSOCIATES, P.C.
526 King StreetSuite 423
Alexandria, Virginia 22314
(703) 8362880